Supreme Court, U.S.
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No. 96-1759

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM JOSEPH KIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, authorized Congress to enact 18 U.S.C. 922(*o*), which makes it a federal crime to transfer or possess a machinegun.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A51) is reported at 105 F.3d 997. The opinion of the court of appeals panel (Pet. App. A52-A81) is reported at 70 F.3d 791.

JURISDICTION

The en banc court of appeals entered its judgment on February 3, 1997. The petition for a writ of certiorari was filed on May 5, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following entry of a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted on one count of possessing a machinegun, in violation of 18 U.S.C. 922(*o*). He was sentenced to one year and one day's imprisonment, three years' supervised release, and a $3,000 fine. A panel of the court of appeals affirmed. Pet. App. A52-A81. The full court subsequently granted rehearing en banc. *Id.* at A82-A83. The court of appeals, sitting en banc, affirmed the conviction and sentence by an equally divided vote. *Id.* at A1-A51.

1. In January and February of 1989, petitioner sold two machineguns to a private citizen. He was indicted on two counts of possessing a machinegun, and two counts of transferring a machinegun, in violation of 18 U.S.C. 922(*o*). Section 922(*o*) generally provides that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. 922(*o*)(1).[1] Petitioner moved to dismiss the indictment on the ground that Section 922(*o*) exceeds Congress's authority under the Commerce Clause. The district court denied the motion, and petitioner entered a conditional guilty plea (see Fed. R. Crim. P. 11(a)(2)) to one of the possession counts, preserving the constitutional issue for appeal. See Pet. App. A53-A55.

2. A divided panel of the court of appeals affirmed. Pet. App. A52-A81. Petitioner contended, *inter alia*,

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[1] The statutory prohibition does not apply, however, to the transfer or possession of machineguns by federal, state, or local governmental agencies, 18 U.S.C. 922(*o*)(2)(A), or to the "lawful transfer or lawful possession of a machinegun that was lawfully possessed before" the statute's effective date, 18 U.S.C. 922(*o*)(2)(B).

that Section 922(*o*) "is unconstitutional because it is beyond the authority granted to Congress under the Commerce Clause." Pet. App. A60. Petitioner relied on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), which made it a federal crime to possess a gun within 1,000 feet of a school. See Pet. App. A61.

The court of appeals concluded that *Lopez* "does not control the result in our analysis of section 922(*o*)." Pet. App. A62. The court explained that

> the activity Congress intended to prohibit by application of section 922(*o*) was the introduction into the stream of commerce [of] machineguns manufactured, imported, or otherwise illegally obtained, after the effective date of the act. When read as a whole, it is plain that the activities prohibited by section 922(*o*) constitute commerce.

Id. at A62-A63. The court of appeals characterized Section 922(*o*)'s ban on the possession of machineguns as "an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market." *Id.* at A64-A65. "As with federal regulation of controlled substances," the court explained, "there is a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of * * * traffic" in machineguns. *Id.* at A65. The court therefore concluded that Section 922(*o*) "is a rational exercise of the authority granted Congress under the Commerce Clause." *Ibid.*

Judge Jones dissented. Pet. App. A69-A81. She found "no meaningful distinction between Section

922(q) and Section 922(*o*) as the latter applies to possession, not transfer, of machineguns." Pet. App. A70. Judge Jones also concluded that "Section 922(*o*) cannot be upheld as a more direct exercise of Congressional commerce power." *Ibid.*

3. The full court of appeals subsequently granted rehearing en banc. Pet. App. A82-A83. On rehearing en banc, petitioner's conviction was affirmed by an equally divided court. *Id.* at A1-A51. Judge Parker, joined by seven other judges, voted to affirm the conviction, explaining that "Congress had a rational basis for concluding that the manufacture, transfer and possession of machineguns substantially affect commerce and § 922(*o*) therefore is constitutional." *Id.* at A3.[2] Judge Jones, joined by seven other judges, concluded that "§ 922(*o*) seems a clone of § 922(q), the provision[] struck down in *Lopez*." *Id.* at A32.

ARGUMENT

Petitioner contends (Pet. 4-14) that 18 U.S.C. 922(*o*) exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. Petitioner principally relies on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), which invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q). Since this Court's decision in *Lopez*, however, the courts of appeals have consistently upheld Section 922(*o*) against constitutional attack. See *United*

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[2] Judge Higginbotham, joined by three other judges (all of whom also joined in Judge Parker's opinion), published a separate concurrence. Pet. App. A3-A21. The concurring opinion asserted that Section 922(*o*) reflects a rational "legislative judgment that possession of machine guns acquired after 1986 has a substantial effect on interstate commerce, particularly by facilitating the trade in illegal drugs." Pet. App. A3.

States v. *Knutson*, 113 F.3d 27, 28-31 (5th Cir. 1997); *United States* v. *Rybar*, 103 F.3d 273, 276-285 (3d Cir. 1996), petition for cert. pending, No. 96-1738; *United States* v. *Beuckelaere*, 91 F.3d 781, 782-787 (6th Cir. 1996); *United States* v. *Kenney*, 91 F.3d 884, 885-891 (7th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948, 951-952 (9th Cir.), cert. denied, 117 S. Ct. 72 (1996); *United States* v. *Wilks*, 58 F.3d 1518, 1519-1521 (10th Cir. 1995). In the absence of a conflict in the circuits, petitioner's constitutional challenge to Section 922(*o*) does not warrant this Court's review.[3]

In *Lopez*, this Court concluded that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Section 922(*o*)'s ban on possession of machineguns, by contrast, is part of a larger prohibition on the possession *or transfer* of a particularly dangerous class of weapons. "[A]t least in most situations," unlawful possession of a machinegun "follows an unlawful transfer." *Rybar*, 103 F.3d at 283. The possession offense defined by Section 922(*o*)—unlike the conduct prohibited by the Gun-Free School Zones Act—is therefore typically linked to a prior unlawful transaction. Because the statutory ban on possession of machineguns is a rational means of effectuating the prohibition on transfers, see Pet. App. A64-A65 (characterizing the ban on possession as "an attempt to

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[3] Although he concedes that the courts of appeals have uniformly upheld Section 922(*o*), petitioner argues (Pet. 5-6) that there are conflicts in the reasoning of the lower courts' opinions. This Court, however, "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Lab.*, 351 U.S. 292, 297 (1956)).

control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market"), it is not akin to the prohibition imposed by Section 922(q).

Petitioner does not contend that Section 922(*o*)'s prohibition on the transfer of machineguns is itself unconstitutional.[4] Any such claim would be unsound. Congress could reasonably conclude that transfers of machineguns would typically have a commercial or economic component. See *Rybar*, 103 F.3d at 283. Congress could also reasonably conclude that the "extensive, intricate, and definitely national market for machineguns," *Beuckelaere*, 91 F.3d at 784, is an appropriate subject for federal regulation. See *Knutson*, 113 F.3d at 29 ("the vast majority of machinegun possessions constitute the culminating step in interstate commercial transactions"); *Rambo*, 74 F.3d at 952 ("By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns."); *Wilks*, 58 F.3d at 1521 (Section 922(*o*) "represents Congressional regulation of an item bound up with interstate attributes"). Although the acts prohibited by the statute might occasionally involve purely intrastate activity, Congress has the authority to regulate intrastate conduct when a series of such events, taken in combination, might ultimately have substantial effects on interstate commerce. See, *e.g.*, *Huddleston* v. *United*

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[4] To the contrary, petitioner appears to acknowledge the validity of the transfer ban. See Pet. 12 ("By prohibiting transfer of machineguns, § 922(*o*) aims directly and completely at commercial activity in machineguns.") (internal quotation marks omitted).

States, 415 U.S. 814, 833 (1974); *Perez* v. *United States*, 402 U.S. 146 (1971); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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